



REPUBLIC OF KENYA



**Hamisi & another v Republic (Criminal Appeal E009 of 2022)
[2024] KEHC 3617 (KLR) (5 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3617 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E009 OF 2022**

MW MUIGAI, J

MARCH 5, 2024

BETWEEN

RAMADHAN HAMISI 1ST APPELLANT

HAJI MASINGU SWALEH BAKARI 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against the conviction and sentence arising from the judgment of the Hon. E. Keago (CM) delivered on 28th February, 2022 in Machakos Criminal Case No.276 of 2018)

JUDGMENT

Background

1. The Appellants herein Ramadhan Hamisi and Haji Masingu Swaleh were jointly charged with two Counts of Robbery with violence contrary to Section 296(2) of the Penal Code.

Count I: Particulars being that on 23rd day of May, 2018 at Machakos Town within Machakos County jointly while armed with dangerous weapons namely an axe and a toy pistol robbed Kennedy Musau Ndisya cash Kshs.20,600/- and at the time of such robbery hit the said Kennedy Musau Ndisya with a fist.

Count II: Particulars being that on 23rd day of May, 2018 at Machakos Town within Machakos County jointly while armed with dangerous weapons namely an axe and a toy pistol robbed Beatrice Kathina Peter cash Kshs.89,000/- and mobile phone Huawei valued at Kshs.8,500/- and at the time of such robbery threatened to use actual violence against the said Beatrice Kathina Peter.
2. The Prosecution called a total of five (5) witnesses in support of its case while the two Accused Persons gave sworn testimonies without calling any witnesses.



Prosecution Case

3. PW1 Beatrice Kathina Peter a resident of Katoloni Estate – Machakos Town carrying out Mpesa services. She told the Court that on 23/05/2018 at around 6.00 p.m. she was with one Kennedy (PW3) at the shop. Kennedy had come to the shop to collect some cash which had been withdrawn by PW1's employer. Shortly thereafter a person came and said he wanted to withdraw some money. PW1 told him she had already closed the shop but the said person insisted that he wanted to withdraw some money. Suddenly, the 2nd person entered and he pointed out a gun at Kennedy while outside the counter while a 3rd person entered and closed. We were all closed inside the shop. The person who wanted to withdraw money opened the drawer and took cash Kshs.89,000/- and the phone. Thereafter, he searched Kennedy (PW3) and took some cash which he had in his pockets. He put the cash collected in his pocket trouser and some in the jumper he was wearing. When they opened the door PW1 and PW3 screamed and people came to help them. The person who had the pistol was arrested at the scene and lynched. The other suspects ran away. The Police came and rescued the injured suspect and took him to hospital. Kennedy (PW3) did not disclose to the PW1 the amount stolen from him. Two (2) identification parades were conducted whereby she identified 2 suspects. The suspects had not covered their faces so she was able to identify them.
4. On cross – examination by the 1st Accused she told the Court that she saw him that day. That he was the one who closed the door. She attended identification parade whereby she was able to identify the 2 suspects.
5. On cross – examination by the 2nd Accused she told the Court that she went to the police station and gave the description of the suspects. She was robbed Kshs.89,000/-. The robbers were at the scene for 30 minutes. There was light from electricity hence she was able to see their appearances and the clothes they had put on.
6. On re-examination she reiterated that the suspects robbed her inside the shop and not outside the counter. It is her employer who made the first investigation report.
7. Pw.2 Dr. John Mutunga stated that he is a medical Doctor based at Machakos Level 5 Hospital. He filled and signed a P3 Form on 14/09/2018 in respect to Kennedy Musau. The said patient was attended on 23/05/2018 with a history of blunt injury to the forehead and cuts on lower head and bruises. By the time he filled the P3 Form the injury was about 2 months. The probable weapon was blunt and the degree of injury was harm.
8. On cross- Examination by 1st Accused he told the Court that the patient had been injured by a blunt object.
9. On cross – examination by 2nd Accused he told the Court that he did not see any teeth injury. The patient had been treated earlier and he only saw him for the purposes of filling of the P3 Form.
10. Pw. 3 Kennedy Musau told the Court that in May, 2018 he was working in a hotel called hotel – Sweet care in Machakos. On 23/05/2018 at around 6.30 p.m. he was sent by his employer to go pick some cash she had withdrawn from Mpesa shop called Image Connection. He proceeded to the Mpesa shop where Beatrice (Pw1) operated. He asked Beatrice (Pw1) to give him the cash and as Pw.1 was checking the message of withdrawal someone pushed the door which was partially closed and entered the Mpesa Shop but the Mpesa Agent told him the shop was closed. Two other people came and said they had come for the money. The one person who had entered first removed an axe, one of the other two removed a pistol and pointed it on Pw's head and the 3rd person stood at the door. The person who had an axe entered inside the counter and took cash and put it into his pockets. He thereafter searched



PW3 and took Kshs.20,600/- and also demanded to be given their phones. The person with the axe threw the axe at PW3 but missed. He then hit him with a fist on his mouth. The person with the pistol hit PW3 on the head and the pistol fell down. He screamed and members of public responded and one suspect (who had the pistol) was arrested while the other two escaped. The one with the cash ran away while throwing some cash to the members of public. He saw the 3 suspects appearances. One of them had a bad eye. As a result of the injuries he lost consciousness and was taken to Dr. Kigonya's clinic within Machakos. He was later treated at Machakos Level 5 Hospital and was issued with a P3 Form. On 29/05/2018 he attended an identification parade and was able to identify one suspect. On 8/09/2018 he attend another identification parade and he identified the suspect who took cash from the shop. One of his eyes was bad. The two suspects identified by Pw3 are Accused 1 and 2 in the dock. Accused 1 is the one who stood at the door while accused 2 is the one who took the cash from the counter. He was robbed Kshs.20,600/- cash from the daily sales.

11. On Cross – examination by 1st Accused he told the Court that nothing belonging to him was found in the accused person custody.
12. On Cross – examination by 2nd Accused he told the Court that he identified the 2nd accused by appearance. They were two in the shop during the incident. There were members of public who witnessed the incident. He attended the identification parade and identified the accused. He gave the police description on how the suspects appeared and dressed on that day and the police arrested him.
13. Re - examination he told the Court that he recorded his statement but the further report was not self – recorded. The Mpesa shop is on a back street.
14. PW4 No.236684 - IP Gervas Okoth Deputy OCS Machakos Police Station told the Court that on 29/05/2018 he conducted an identification parade on a suspect who had been arrested. He arranged 8 people and the suspect choose to stand between numbers 6 &7. Both Pw.1 and Pw.3 identified the suspect (Haji Masingo Swaleh Bakari - 2nd Appellant herein) by touching him.
15. Again on 8/11/2018 he conducted another identification parade on a suspect who had been arrested. He arranged 8 people and the suspect choose to stand between No.2 and No.3. Both Pw1 and Pw2 identified the suspect – (Ramadhan Hamisi 1st Appellant herein). He signed the Form and produced the Form as Exhibit No.7.
16. The witnesses had no opportunity to meet in between the parade as there were different doors to enter and leave the parade scene.
17. On cross – examination by 1st Accused he told the Court that he was not aware of any photos taken by one Mwaura. The Witness had come for purposes of identification parade and had to stay as the procedure was being done.
18. On cross – examination by 2nd accused he told the Court that the parade was composed of members who had same complexion and height.
19. PW5 No. 78922 Pc. Philip Kigen of Machakos Police Station told the Court that he took over file No. 404/2418 – Court File No. 276/2018 after the Investigation Office Ibrahim Gedi was transferred to Mlolongo. He got a report on 23/05/2018 that there was an incident where a suspect had been set ablaze by members of public. The report was that 3 robbers had entered an Mpesa shop armed with a toy pistol and axe. They robbed the Mpesa shop. One of the suspects who had the toy pistol was arrested and lynched by the mob while the other two suspects ran away. The complainants were Beatrice (PW1) and Kennedy (PW3). PW3 was hit with the toy pistol at the head and he was injured. The lynched suspect body was taken to the city mortuary. 1st accused was arrested and an



identification parade conducted on 26/05/2018 and was positively identified by both PW1 and PW3. 2nd Accused was later arrested on 6th November, 2018 in Nairobi and identification parade conducted on 8/11/2018 and was also positively identified by the complainants PW1 & PW3. PW1 produced a receipt of the phone stolen as well as a statement for the period 25/05/2018 from Agent showing she was operating an Mpesa Shop. PW1 also produced the stock sheet for that day showing that she had Kshs.89,000/- which was stolen. The suspect lynched by the mob was called Saidi Ali. Kennedy (PW3) was injured and went for treatment and was later issued with a P3 Form.

20. On cross – examination by 1st Accused Person he told the Court that the 1st accused was identified during the parade. The complainant reported that they saw you at the door of the Mpesa shop. You were arrested upon being mentioned as having been at the scene of robbery. There was no CCTV footage recovered.
21. On cross – examination by 2nd accused person he told the Court that the incident occurred at 6.00 – 7.00 p.m. There were security lights. There was no description given but the police carried out their investigations. There were no photographs taken at the Police Station.
22. On further – cross – examination by 1st Accused Person he stated that when a suspects commits an offence he may decide to stay or go to hide by himself.
23. On Re-examination he told the Court that 1st and 2nd Accused persons were at the scene of the offence. The two accused persons were positively identified during the identification parade. The incident occurred/happened in a place that was well lit. The 2nd accused was arrested after committing another offence.
24. Pw.4 IP No.236684 - IP. Gervas Okoth was recalled. He produced the toy pistol recovered at the scene which was in custody of the lynched suspect as Exhibit 1.
25. On cross – examination by the 1st Accused Person he stated that the said exhibit was in in possession of the lynched suspect. That the 1st accused was placed at the scene of crime by the Complainant.
26. On cross – examination by the 2nd Accused person he stated that Kennedy (Pw.3) was hit with the pistol on the head as well as with a fist.
27. On re-examination he stated that the 1st and 2nd accused persons were in company of the lynched suspect.
28. The Prosecution closed its case on 6/07/2021.
29. The Trial Court delivered its ruling on case to answer on 7/09/2021.

Defence Hearing

30. The 1st accused gave sworn statement and did not call any witness while the 2nd accused person gave sworn statement and called one witness.
31. DW1 Ramadhani Hamisi stated that he worked as a labourer. On the alleged date he was at home observing the holy month of Ramadhani. He was arrested the following day as he left the mosque. He was photographed and later identification parade conducted. He was not arrested with any exhibit.
32. On cross – examination by the Prosecutor he stated that he did not have anything to show that he was at home the whole day. Nobody forced him to take part in the identification parade though he was not comfortable with the parade. He had seen the complainant at the police station at a distance.



33. On cross – examination by Court he stated that he did not give the reason why he was not comfortable with the identification parade.
34. DW2 Hamisi Masungu Swaleh Bakari stated that he is a resident of Nairobi, Pumwani where he worked as a Garbage Collector. In 2018 November he was arrested and taken to Shauri Moyo and later transported to Machakos Police Station and charged with the present offence before Court. He was not involved in any robbery.
35. On cross – examination by the Prosecutor he stated that he had never resided at Machakos. He had never met the complainant.
36. Dw3 Asah Swaleh Kathui a resident of Pumwani Nairobi told the Court that Dw2 is her younger brother. On 23/05/2018 the whole family was at home including Dw2.
37. On cross – examination by the prosecutor she stated that they stay together in the same house but she could not tell where he goes all the time.

Judgment of the Trial Court

38. The Trial Court delivered its Judgment on 28th day of February, 2022 and convicted the 2 Accused persons under Section 215 of the Criminal Procedure Code. The two Accused persons were sentenced to hang.

Appeal:

39. Aggrieved by the conviction and sentence of the Trial Court the Appellants herein filed their Memorandum of Appeal on 4th March 2022 on the following Grounds of Appeal;
 - a. That the Trial Magistrate erred in both law and facts by convicting them despite inconsistent, insufficient as well as contradictory evidence.
 - b. That the whole process of identification parade was questionable and doubtful.
 - c. That the Learned Trial Magistrate erred in both law and facts by not considering their sworn defence.

Amended Grounds of Appeal

40. Haji Masingo Swaleh Bakari the 2nd Appellant herein filed his amended Grounds of appeal on 27/07/2023 and listed the following 3 grounds of Appeal;
 1. That the Trial Magistrate erred in law and fact while convicting the Appellant in reliance with the purported identification of the Appellant by PW1 and PW3 which same was riddled with doubts unsafe to base a conviction.
 2. That the Trial Magistrate further lost direction in evidence of the whole set of prosecution witnesses and failed to consider the creditability of the same which rendered to misdirection in the findings of the Trial Court while also the Appellant was denied his rights contrary to Article 50(h) of *the Constitution*.
 3. That the Trial Magistrate erred in law while rejecting the Appellants alibi defence without putting into consideration the same was not rebutted by the prosecution side as per Section



212 of the Criminal Procedure Code Cap 75 Laws of Kenya and Section 169 of the same code was violated.

41. The 2nd Appellant wherefore prays that his Appeal succeed with its totality. Conviction and sentence imposed be set aside.
42. The Appeal was canvassed by way of written submissions.

Written Submissions

1st Appellant Submissions dated 3/07/2023

43. Ramadhani Hamisi the 1st Appellant based his submissions on his grounds of Appeal.
44. On the authenticity of the charges and credibility of the witnesses it is submitted that the charges were malicious based on nothing but suspicions which were not proved. It is not in doubt that the Court cannot tell when the report was made, the date the Appellant was arraigned or when the appellant was identified or which of the appellants was first accused according to the charge sheet and proceedings.
45. Reliance is made in the case of Terekali –vs- Republic [1952] EACA where the Court considered the important of the first report:-

“Evidence of first report by the complainant to a person in authority is important as often provides a good test by which the true and accuracy of subsequent statement may be ganged and provides a safeguard case. Truth will always come out from a statement taken from a witness at time when recollection is very fresh and has no time for consultation with others.”
46. On the issue of identification reliance is made in the case of Republic –v- Turnbull [1976] 63 Cr. App. R.132 where the law on identification is well settled. It is submitted that the witnesses herein did not describe the physical appearance of the Appellant at reporting time but the same was done after the arrest and during identification parade.
47. Reliance is made in the case of Mohamed Elibite Hibuya & another –v- Republic – Cr. Appeal No.22 of 1996 (unreported) and also in the case of Maitanyi –vs- Republic [1986] KLR 198.
48. On whether there was a link of the offence to the Appellant it is submitted that both Pw.1 and Pw.3 were not credible witnesses and their evidence were based on suspicion. Similarly the weapons allegedly used and recovered from the scene were not subjected to analysis to find the fingerprints.
49. The Trial Court disregarded the defence of alibi raised by the Appellant though the prosecution did not dispute the same.
50. It is finally submitted that there was no direct, cogent, convincing and compelling evidence to warrant the Trial Court to convict the Appellant.

2nd Appellant submissions filed on 27/07/2023

51. Haji Masingo Swaleh Bakari the 2nd Appellant based his submissions on his 3 grounds of Appeal.
52. It is submitted that the Court was not told for how long the ordeal took place and how long each of the witnesses was able to observe their intruders so as to distinguish the Appellant as one of the attackers.
53. Similarly the Court was not told whether the witnesses described the attackers to the police or whether the appellant had left some impression on their mind to such an extent that they could identify him



if they saw him again. Pw.3 told the Court that the suspects had covered their faces during the attack then how did he manage to note the Appellant had a bad eye?

54. Reliance is made in the case of James Tinega Omwenga –vs- Republic – Cr. Appeal No. 143 of 2011 where the Court expressed itself as follows:-

“The law is settled, that in general, identification of a suspect who was a stranger at the time the offence was committed, which was not followed by the witness describing the suspect to the police who would organize a properly conducted identification parade at which the witness is afforded an opportunity to affirm his identification by pointing out the suspect, is a dock identification which in some cases is regarded as worthless.

55. It is finally submitted that the prosecution did not rebut the Appellant’s alibi defence while they had an opportunity to do so.

Respondent submissions dated 31st May, 2023 & further Submissions dated 18/09/2023

56. It is submitted that the Prosecution adduced direct evidence linking the Appellants to the offence. The testimony of Pw.1 and Pw2 clearly placed the Appellants in the crime scene. The Appellants were well identified properly and an identification parade conducted appropriately.
57. The ingredients of robbery with violence proved sufficiently by the prosecution as the testimony of Pw.1 and Pw3 clearly showed that the Appellants plus another person were armed with an axe and a toy pistol, the Appellants were 3 in number and they inflicted injury to Pw3 at the time of the offence.
58. Both Appellants were positively identified during the two parades conducted by the police on 29th May, 2018 and 8/11/2018.
59. The prosecution witnesses corroborated their evidence and there were no inconsistencies or contradictions.
60. Reliance is made in the case of Richard Munene –vs- Republic with regard to contradiction or inconsistency in the evidence of the prosecution witness and the Court stated that;

“.....Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.

It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.”

61. The Appellants herein were initially represented by one Mr. Mukula for accused 1 and Mr. Tom Muthama for Accused 2. Mr. Mukula was discharged by the Court but for Mr. Muthama discharge is not recorded. no record is available no what happened next.
62. The Appellants proceeded with the Trial without pro-bono Counsels and were able to cross – examine all the witnesses appropriately. They prepared for their defence and were cross – examined by the Prosecution therefore they did not suffer any substantial injustice in the trial process.



63. The Appellants did not protest in the Trial Court that they required legal representation. They proceeded with the trial without any issues and conducted their defence substantially without requesting the Trial Court for any facilities such as proceedings to aid them in their defence.
64. The Respondent relied on cases Republic vs Karisa Chengo & 2 Others [2017] eKLR & Lawrence Ombunga Otondi & Anor vs Republic on the issue of legal representation at State expense.

Determination

65. The Court considered the Trial Court Record , memorandum of appeal and written submissions by parties through respective Counsel.

Appeal

66. The Court has outlined the evidence adduced during trial and is mandated to evaluate and reexamine the evidence on record and reach an independent decision.

In Okeno Vs. Republic (1927) E.A 32 it was stated that;

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424.”

Burden & Standard of Proof

67. It is trite that all criminal offences require proof beyond reasonable doubt. Lord Denning in Miller vs. Ministry of Pensions (1947) 2 All ER, 372 stated as follows:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is beyond reasonable doubt, but nothing short of that will suffice

68. It is trite that all criminal offences require proof beyond reasonable doubt. In Peter Wafula Juma & 2 Others v Republic [2014] eKLR; the Court referred to Viscount Sankey L.C in the case of H.L. (E)* WOOLMINGTON V DPP [1935] A.C 462 pp 481 on legal burden of proof in criminal matters, that;

‘Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception...No matter what the charge or where the trial, the principle that the prosecution must prove



the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

Robbery with Violence

68. Oluoch –Vs – Republic [1985] KLR

“Robbery with violence is committed in any of the following circumstances:

- a) The offender is armed with any dangerous and offensive weapon or instrument; or
- b) The offender is in company with one or more person or persons; or
- c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person
.....”

The evidence on record in a nutshell is that PW1 & PW3 were accosted on 23/5/2018, by 3 Accused persons, who demanded money from PW1& PW3 from the Mpesa shop and at the time , one of the Accused person was at the door inside the shop and 2 were inside the shop over the counter , one holding a pistol to PW3 and the other who had an axe was collecting money. These facts depict robbery with violence they were 3 suspects 1 of them who had the money was lynched by members of the public and after rescue by Police and was taken to hospital succumbed to his death. The body of SAID ALI was released for burial as confirmed by of Halima Mohammed Ahmed of 24/5/2018. The events above confirm the ingredients of robbery with violence, more than 1 person, with weapon to cause threat or actual violence on victim(s) and in the process rob them, in this case money was stolen from Mpesa shop.

Identification

69. The Appellant submitted that the purported identification by PW1 & PW3 was riddled with doubts and unsafe to base a conviction and further how the 2 witnesses managed to identify their attackers without putting into consideration the sudden attack and was unexpected and very short-lived which could not register positive identification.

70. PW1’s testimony is that on 23/5/2018 at 6 pm a person entered the shop despite her telling him the M pesa shop was closed he came in and pointed the gun at PW3 (Kennedy) and said they came for cash. Suddenly the 2nd person entered and he pointed out a gun at Kennedy while outside the counter while a 3rd person entered and closed. We were all closed inside the shop. The person who wanted to withdraw money opened the drawer and took cash Kshs.89,000/- and the phone. Thereafter, he searched Kennedy (Pw3) and took some cash which he had in his pockets. He put the cash collected in his pocket trouser and some in the jumper he was wearing. When they opened the door Pw.1 and Pw.3 screamed and people came to help them. The person who had the pistol was arrested at the scene and lynched. The other suspects ran away.

PW1 went on that the shop was small and she could see suspects, they had not covered their heads and she was able to identify them

One of the suspects had an eye which appeared wounded and they argued for some time. The other suspect she identified by appearance and he had a jumper.



71. On cross – examination by the 1st Accused she told the Court that she saw him that day at the Mpesa shop. The 2nd Accused is the one who came in and wanted to withdraw. That he was the one who closed the door.
72. On cross – examination by the 2nd Accused she told the Court that she went to the police station and gave the description of the suspects and the [police] recorded. She could not recall what time, she went to the station. She gave the description to the Police and they recorded and she said she could identify the suspects. She was robbed Kshs.89,000/-. She did not record a Further statement.
- The robbers were at the scene for 30 minutes. There was light from electricity hence she was able to see their appearances and the clothes they had put on. The bag was black and she could not tell if it was branded or not.
73. PW3 stated that on the same day, he was sent by his employer to go and collect the money from Mpesa Agent called Image Connection. He found PW1 and she was about to close the shop. He asked Beatrice (Pw1) to give him the cash and as Pw.1 was checking the message of withdrawal someone pushed the door which was partially closed and entered the Mpesa Shop but the Mpesa Agent told him the shop was closed. Two other people came and said they had come for the money one of them had a phone and PW1 told them the shop was closed. The Lights were on and PW3 tried to talk to the person and he did not respond to him. The one person who had entered first removed an axe, one of the other two removed a pistol and pointed it on P3'S head and the 3rd person stood at the door. The person who had an axe entered inside the counter [side]and took cash and put it into his pockets. PW3 was standing at the door with the pistol placed on his head.
74. He thereafter searched PW3 and took Kshs.20,600/- and also demanded to be given their phones. The person with the axe threw the axe at PW3 but missed. He then hit him with a fist on his mouth. The person with the pistol hit Pw3 on the head and the pistol fell down. He screamed and members of public responded and one suspect (who had the pistol) was arrested while the other two escaped. The one with the cash ran away while throwing some cash to the members of public. He saw the 3 suspects appearances. He saw the 3 suspects as they were close. They had not covered their faces He saw their appearance. One of them had a bad eye. He recognized them by appearance.
75. On cross examination by 1st Accused person, PW3 stated that he did not work in the Government Offices and was not aware that the Accused person was photographed. He was with the person who had the pistol and 1st Accused did not hit him and none of his properties were recovered from 1st Accused person.
76. On cross examination of the 2nd Accused PW3 stated he was able to identify him by appearance. He was robbed Ksh 20,600/- He referred to him as a young man and did not know his name. he did not lead the Police to his arrest. The incident occurred at a shop on tarmac road where people walk on foot. There were 2 people at the shop and members of the public witnessed the incident and there was electricity at the shop.
77. On the issue of Identification, the Appellant contested identification in the absence of an identification parade. In *R. vs. Turnbull & Others* [1973] 3 All ER 549 it was held that:
- “...The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance: In what light: Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the



original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?”

78. From the evidence on record, PW1 & PW2 were detailed and consistent in their testimonies and cross-examination by the Accused persons with regard to the incident/robbery which occurred in broad daylight at around 6 pm in the Mpesa shop. Outside there were security lights and inside the Mpesa Shop electricity was on. The assailants were not covered in masks or in any other way, they spoke and engaged PW1 & PW2 as they sought to take off with funds, and with the victims, the accused persons, were in close proximity, talking to each other on removal of money and giving it to the accused took some time. The Accused persons and witnesses were in the shop for 30 minutes and in close range to see talk and give out the money. The space in the shop was small so they were close-knit and nothing impeded contact and sight. The circumstances were conducive for positive identification. As the 1st Appellate Court, I find as per evidence on record identification of the Appellants by PW1 & PW3 was positive in the circumstances making allowance for the fact that the Trial Court has had the advantage of hearing and seeing the witnesses,

Identification Parade

79. The Appellant submitted the witnesses herein did not describe the physical appearance of the Appellant at reporting time but the same was done after the arrest and during identification parade. The Appellant relied Mohamed Elibite Hibuya & another –v- Republic – Cr. Appeal No.22 of 1996 (unreported) and also in the case of Maitanyi –vs- Republic [1986] KLR 198.
80. This Court perused the Trial Court proceedings, PW1 & PW3 stated that they described the suspects to the Police who recorded. PW4 the Identification Parade Officer was cross examined by each of the Accused persons and the issue of description of the suspect before ID parade was not raised. PW5 P.C. Philip Kigen of Machakos Police Station Crime Branch Office who was handed over the Police File by I/O Ibrahim Keli in cross examination by each of the Accused persons, the issue of description of suspects when PW1 & PW3 made reports at the Police Station if they were made or not was not tackled. In the absence of cross examination by the Accused persons on the description while PW1& PW3 made reports to either or all witnesses and absence of witness statements this Court cannot possibly verify /confirm the issue regarding description of Accused persons was made or not suffice is to have the evidence of PW1 & PW3 as recorded that they identified the Appellants and positively identified them in the identification parade.
81. PW4 No.236684 - IP Gervas Okoth Deputy OCS Machakos Police Station told the Court that on 29/05/2018 he conducted an identification parade on a suspect who had been arrested. He arranged 8 people and the suspect choose to stand between numbers 6 & 7. Both PW1 and PW3 identified the suspect (Haji Masingo Swaleh Bakari - 2nd Appellant herein) by touching him.
82. On 8/11/2018 he conducted another identification parade on a suspect who had been arrested. He arranged 8 people and the suspect choose to stand between No.2 and No.3. Both PW1 and PW2 identified the suspect – (Ramadhan Hamisi 1st Appellant herein). He signed the Form and produced the Form as Exhibit No.7.
83. The witnesses had no opportunity to meet in between the parade as there were different doors to enter and leave the parade scene.



84. On cross – examination by 1st Accused he told the Court that he was not aware of any photos taken by one Mwaura. The Witness had come for purposes of identification parade and had to stay as the procedure was being done.
85. On cross – examination by 2nd accused he told the Court that the parade was composed of members who had same complexion and height.
86. The ID parade forms were duly signed, the Appellants did not give name of anyone they each wanted present during the ID parade, it is written ‘Hakuna’ & ‘Niko Sawa’ their consents are ‘Nimekubali’& ‘I Consent’
87. On results of the Parade on the ID parade form for Ramadhan Hamisi stated on being identified He [PW3] had seen him today in the station and she [PW1] had been vending tea in the offices.
88. On results of the Parade on the ID parade form for Haji Masingo on being identified stated that PW1 had been shown his photo and PW3 might have been informed the way he was dressed.
89. The ID Parade Officer recorded that the witnesses were kept in separate rooms and never saw Accused persons before the parade.
90. In light of the above comments it is one person’s word against the other, to prove an allegation or ingredient of an offence evidence is crucial. The allegations of the witnesses seeing the Appellants before the ID parades were conducted either through alleged photograph and/or from within the Police precincts were not borne out by evidence to prove the allegations. In the absence of cogent and tangible evidence to prove the allegations this Court finds the ID parade lawfully and legally conducted and the appellants were properly identified.

ALIBI Evidence

91. The Appellant raised the issue on appeal that the alibi defense was rejected without putting into consideration that the alibi was not rebutted by the Prosecution as per Section 212 & 169 of CPC.

212. Evidence in reply

92. If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter.
93. The option to be taken by Prosecution to verify the alibi or not is not within the purview of the Trial Court, the Trial Court is an umpire and cannot take sides nor instruct either the Prosecution or Defence on how to conduct their case. The Court record does not reflect an application by the Prosecution seeking more time to confirm or dispute the alibi. The Trial Court considered the evidence on record.
94. The Court of Appeal in Charles Anjare Mwamusi vs R CRA No. 226 of 2002 stated that:

“An alibi raises a specific defense and an accused person who puts forward an alibi as an answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. Kimotho Kiarie V. Republic (1984) KLR 739 at page 745 paragraph 25.”



95. In *Kimotho Kiarie vs Republic* [1984] eKLR, the Court mandates;
- “that an alibi raises a specific defense and an accused person who puts forward an alibi as answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of the Court a doubt that is not unreasonable.”
96. The 1st Appellant DW1, stated in a sworn statement that he was arrested as he was opening the fast as he left the mosque. He was arrested and kept in custody for 1 week, photographed and later identification parade was conducted and was charged with the offence. He was not arrested with any exhibit. He stated he was arrested the next day after the incident he saw the Complainant at the Crime Office at a distance.
97. In cross examination stated that he had nothing to prove that he was home that whole day. In cross examination by the Court he did not give reason why he was uncomfortable with the Identification parade.
98. The 2nd Appellant, DW2 testified in 2018 November, he was arrested and taken to Shauri Moyo he was collected and taken to Machakos Police Station and charged with the present offence. He was not arrested with any exhibit. He stated he was not involved in the robbery.
99. In cross examination, he stated that he had never stayed in Machakos but lived in Nairobi, he saw the Complainant the first time before Court.
100. DW3 Asah Swaleh Kathui sister to 2nd appellant testified that the 2nd Appellant his younger brother, stated that on 23/5/2018 it was Ramadhan and she was at home cooking with their father and brothers.
101. In cross examination she stated that they lived together with 2nd Appellant in the same house but could not tell where the Accused goes all the time, she was not with him always.
102. This Court has carefully considered the evidence of PW1 & PW3 who met at the Mpesa shop , PW3 came to collect Mpesa money , seems from the record, they had not met before nor were they known to each other, but they went through the robbery by 3 assailants who accosted them, there was light in the shop 30 minutes commotion was sufficient to identify the Appellants and one other now deceased and taking the evidence of PW1 & Pw3 in its totality, this Court finds that the robbery with violence was proved beyond reasonable doubt. The Appellants alibi did not create sufficient doubt against the evidence on record.

Legal Representation

103. The Appellants submitted that they were initially represented by Counsel, Mr Mukula (1st Accused) who was later discharged by the Trial Court & Mr. Muthama (2nd Accused). The Court Record confirms that the Advocates were present on 15/4/2019 and the hearing was adjourned on Advocate’s application. On 2/7/2019 Counsel for 1st Accused sought to be discharged for personal reasons and the Trial Court granted the application. The Appellants submitted that their legal rights under Article 50 (h) of *the Constitution* were vitiated which allowed the Accused person ‘to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly’;
104. In *Republic vs Karisa Chengo & 2 Others* [2017] eKLR the Supreme Court observed;
-



While it is therefore undeniable that a person facing a death penalty and who cannot afford legal representation is likely to suffer substantial injustice during his trial; the protection embedded in Article 50 (2) (h) goes beyond capital offence trials. The Court of Appeal indeed appears to have embraced this reasoning in a recent decision in *Thomas Alugha Ndegwa v. Republic*; C.A No. 2 of 2004, when it allowed an application for legal representation by the appellant who had been convicted of defilement and sentenced to life imprisonment.

105. In *Lawrence Ombunga Otondi & Anor vs Republic* [2016] eKLR

According to *the Constitution*, the right to legal representation to an Accused person by the State and at the State's expense crystallizes when substantial injustice would otherwise result. The Court of Appeal in the case of *David Macharia Njoroge vs. Republic* (2011) eKLR analyzed several aspects of this right and as regards the applicability of Article 50 of *the Constitution*, the Court held as follows:-

“State funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigned to him by the State and at state expense, if substantial injustice would otherwise result (emphasis added). Substantial injustice is not defined under *the Constitution*, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore, provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.

106. In the instant case, both Appellants were represented by Advocates appointed through Pro bono Committee, at some point during the Court proceedings Counsel for 1st Accused was discharged on his request. Thereafter, the issue of Counsel representing the Appellants was not raised by the Appellants to have alternative Legal representation during trial. The Trial Court did not pursue the issue of legal representation by and/or for the Appellants. The crux of the matter is that definition and/or parameters of substantial injustice is not succinctly defined neither is legal representation made mandatory in all offences that carry death penalty and/or life imprisonment.

107. In the case of *Moses Gitonga Kimani vs. Republic*, Meru Criminal Appeal No. 69 of 2013,

As regards the denial of that representation in the instant case, we do not think that an acquittal is the remedy available to the appellants as they submitted. It cannot have been the intention of the framers of *the Constitution*, to halt all criminal prosecutions of persons charged with capital offences until the implementation of a scheme to provide legal representation to all persons charged with such offences. Sadly, again an acquittal is not the remedy available to the appellants even if their right was violated in the trial court. This Court in *Julius Kamau Mbugua v Republic* Criminal Appeal No. 50 of 2008 has held that an acquittal is not an appropriate remedy where the alleged violation of fundamental rights of the accused has been proved.

Nor did the appellant point out that the substantial injustice was caused to them by such failure. The respective records show that they were never inhibited at all in the prosecution of their cases during the trial. They actively participated in their trials and subjected to intense cross-examination the witnesses availed by the prosecution. We therefore discern no substantial injustice occasioned to the appellants by the State's failure to accord them legal representation. This ground must of necessity therefore fail.”



108. In the instant case, the Appellants who had advocates representing them, once the Advocates withdrew from representing the Appellants, they by design or default did not raise any concern that they were no longer represented, or raise with the Trial Court grounds of prejudice or substantial injustice in proceedings. It is not clear from the Court record what transpired to culminate with constructive withdrawal and discharge from representation of the Appellants.
109. The Court record confirms the Appellants actively participated and in cross examination of all witnesses and ably presented written submissions. The issue of substantial injustice is/was not borne out by the record.
110. The *Legal Aid Act* 2016, alluded to in the Chengo case supra also falls short of definition of substantial injustice and prescribes vide Section 43(6) that despite the provisions of this Section, lack of legal representation shall not be a bar to the continuation of proceedings against a person.
111. For these reasons, the lack of legal representation by and of itself did not infringe on the appellants' constitutional rights. This Court finds the identification of the Appellants by Prosecution witnesses sufficient to sustain the conviction.

Sentence

112. The Supreme Court in emerging jurisprudence and binding precedent considered the mandatory death penalty sentence in Francis Karioko Muruatetu & another v Republic [2017] eKLR (Muruatetu 1) held in part;
 - a. The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of *the Constitution*.
113. In Julius Manyeso Kitsao vs Republic Malindi Criminal Appeal 12 of 2021 cited in Herman Mwero Mwavughanga vs Republic Criminal Appeal 111 of 2022 C.A.Mombasa that considered the issue of indeterminate sentences -life imprisonment and found comparative jurisprudence compelling and held;

We are equally guided by the holding of the Supreme court of Kenya and in the instant appeal, we are of the view that having found the sentence of life imprisonment unconstitutional, we have discretion to interfere with the sentence.[reduced to 35 years]
114. In Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment), Machakos High Court, the Court held

Taking cue from the decision in Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR (Muruatetu 1) those who were convicted of sexual offences and whose sentences were passed on the basis that the trial Courts had no discretion but to impose the said mandatory minimum sentence are at liberty to petition the High Court for orders of resentencing in appropriate cases.

See also; C.A.Kisumu Criminal Appeal 22 of 2018 Evans Nyamari Ayako vs Republic; [reduced to 30 years]C.A. Malindi Criminal Appeal 54 of 2021 Roy Nyale vs Republic [reduced to 25 years] High Court Criminal Appeal 50 of 2019 Siaya High Court [reduced to 60 years]



115. In light of the above consideration in sentencing mandatory death penalty and mandatory life sentence have been declared unconstitutional where the Trial Court's hands are tied without consideration of the specific circumstances of the case and /or taking into account the elaborate and comprehensive Judiciary Sentencing Policy Guidelines in determining appropriate sentence.

116. In the instant case, the appellants are 1st Offenders partly were in custody and partly out on bond.

Disposition

117.

1. The appeal is dismissed on conviction, the Trial Court's judgment of 28/2/2022 is upheld.
2. In line with the binding precedent on death penalty and life imprisonment. This Court sets aside death penalty and in place sentences both Appellants to 20 years imprisonment w.e.f 3/5/2018 upto 3/4/2020 when they were granted Cash bail of Ksh 20,000/- each 2years and 1 month under Section 333 (2) CPC.

JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 5TH MARCH, 2024 (VIRTUAL/PHYSICAL CONFERENCE).

M.W. MUIGAI

JUDGE

IN THE PRESENCE/ABSENCE OF:

RAMADHAN HAMISI - 1ST APPELLANT

HAJI MASINGU SWALEH BAKARI – 2ND APPELLANT

Mr. Simiyu - FOR THE APPELLANT

MR. MWONGERA - FOR THE RESPONDENT

GEOFFREY/PATRICK - COURT ASSISTANT(S)

(JUDGE BEREAVED)

JUDGMENT RELEASED TO REGISTRY ON 26/3/2024.

M.W.MUIGAI

JUDGE

